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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-739

THE BOARD OF EDUCATION OF THE LITTLE ROCK SCHOOL DISTRICT, *et al.*,

Petitioners,

vs.

DELORES CLARK, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Opinions Below

The August 21, 1972 opinion of the United States Court of Appeals for the Eighth Circuit is now reported at 465 F.2d 1044. The district court opinion, reprinted at pp. A-14 to A-31 of the appendix to the Petition, is not reported.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Question Presented

Did the Court of Appeals err in requiring that an acceptable plan of desegregation in Little Rock affect all elementary grades, and in rejecting the school board's offer to desegregate only two of five elementary grades?

Statement

Respondents generally accept the Statement offered by the Petitioners, but we note the following:

1. The description of the plan offered by the Petitioners, which the Court of Appeals rejected, is technically correct but astonishingly fails to mention that as to grades 1-3 in the so-called "perimeter" elementary schools, the plan would leave them as segregated as the entire five grades were in 1971, when the Court of Appeals required further desegregation. *Clark* v. *Board of Educ.*, 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

2. This action to fully desegregate the public schools of Little Rock, Arkansas, has been pending since 1965. *See Clark* v. *Board of Educ.*, 369 F.2d 661 (8th Cir. 1966); 426 F.2d 1035 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971); 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972). Joined with its predecessor action, it is one of the nation's oldest school desegregation cases. *See, e.g., Aaron* v. *Cooper*, 143 F. Supp. 855 (E.D. Ark. 1956), *aff'd* 243 F.2d 361 (8th Cir. 1957); *Norwood* v. *Tucker*, 287 F.2d 798 (8th Cir. 1961).

3. With regard to the matters alleged in n. 1 of the Petition, the former school administrators or school board members sued in their official capacities are no longer

parties to this action even in the absence of a formal order to that effect. F.R.C.P. 25(d). *Compare Bradley* v. *School Bd. of Richmond,* 324 F. Supp. 401 (E.D. Va. 1971).

Reasons Why the Writ Should be Denied

This is the third Petition for Writ of Certiorari in as many Terms of this Court filed by the Little Rock school board, seeking to overturn orders requiring effective desegregation of the Little Rock public schools. Each of the prior Petitions was denied, 402 U.S. 952 (1971); 405 U.S. 936 (1972), but the board now attempts to raise, in its present Petition, all of the claims it unsuccessfully sought to raise before.

1. The issue is failure to desegregate three grades.

The only issue properly presented in this case is whether a plan which desegregates only two grades of five-grade schools can be said to be adequate compliance with a school district's obligation to dismantle its formerly dual school system. The question whether school segregation in Little Rock resulted accidentally or whether it is a vestige of the prior dual school system was determined adversely to the school district in 1970, 426 F.2d 1035 (8th Cir. 1970), *cert. denied,* 402 U.S. 952 (1971). See Brief in Opposition to Certiorari, No. 409, O.T. 1970, pp. 618, 12-15, 19-26. Likewise, the necessity for complete desegregation at the elementary level was before the Court of Appeals in 1971, 449 F.2d 493 (8th Cir. 1971), *cert. denied* 405 U.S. 936 (1972), and the lower court was required to have submitted to it and to approve for implementation, a plan to complete the desegregation of the elementary schools using any or all of the techniques

validated by this Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

The plan submitted by the school district would involve only fourth and fifth grade students in the elementary schools on the eastern and western extremities of the City of Little Rock. Pupils in the first three grades would remain as totally segregated at these schools as were the entire student bodies in 1970—when the Court of Appeals explicitly condemned maintenance of the school zones as vestiges of the dual system. 426 F.2d at 1043-44, notes 18-22 and accompanying text.

2. The decision below will require neither excessive transportation nor inordinate expense.

The crosstown transportation of elementary students to which Petitioners refer is the result of their own design of a plan. In Little Rock, as is generally true, two basic approaches are available to desegregate groups of racially identifiable schools located generally on the opposite sides of town. The shortest bus rides can be achieved if the central city schools are included in a pupil transportation plan, although a larger number of students would have to ride the buses. Petitioners chose the other approach, which minimizes the number of students who must travel but enlarges the distance which those students must go, by desegregating the center city schools as a single unit with virtually no transportation (Petition, pp. 4-5) and exchanging students among the schools at either extremity.

The expense to the school district of which Petitioners complain is insubstantial in comparison to the enormous unnecessary past expenditures through which the school district constructed additional segregated facilities at the extreme ends of the city and which it now finds so difficult

to desegregate. *See, e.g., Clark* v. *Board of Educ.*, 401 U.S. 971 (1971).

3. The principle applied below is well settled among the lower federal courts.

The Petitioners misrepresent the Eighth Circuit's decision in *Yarbrough* v. *Hulbert-West Memphis School Dist.*, 457 F.2d 333 (8th Cir. 1972) in their effort to develop some conflict among the lower courts. That case did not involve desegregation only of some grades, but rather a comprehensive plan for a small school district, within which projected student enrollments at each school would vary by 20% on either side of the system-wide racial ratio. *See* 339 F. Supp. 1059 (E.D. Ark. 1971). Plaintiffs' complaint was that traditionally black schools remained black and traditionally white schools white. In light of the specific factual circumstances (an exception to this pattern had been projected but failed to materialize), the Court of Appeals declined to reverse, although it did authorize the district court to modify the plan.

Indeed, the law is clear in all of the Circuits which have decided the question: desegregation plans must affect all grades absent compelling justification for specific exemption. *E.g., Flax* v. *Potts*, 464 F.2d 865 (5th Cir.), *cert. denied*, 41 U.S.L.W. 3274 (November 13, 1972); *Thompson* v. *School Bd. of Newport News*, 465 F.2d 83 (4th Cir. 1972), *cert. pending; Jackson* v. *Marvell School District No. 22*, 425 F.2d 211 (8th Cir. 1970); *Moore* v. *Tangipahoa Parish School Bd.*, 304 F. Supp. 244 (E.D. La.), *aff'd* 417 F.2d 801 (5th Cir. 1969); *Graves* v. *Walton County Bd. of Educ.*, 403 F.2d 181 (5th Cir. 1969); *cf. Moses* v. *Washington Parish School Bd.*, 456 F.2d 1285 (5th Cir.), *cert. denied*, 41 U.S.L.W. 3274 (1972).

There may be some differences of opinion among the Courts of Appeals in school desegregation cases, but not with respect to the issue in this case.* Contrary to Petitioners' claim, granting the Writ in this case would hardly assist the Court in reaching its decision in the Denver case, *Keyes* v. *School Dist. No. 1*, No. 71-507 (argued October 11, 1972), or any other school desegregation case which is presently pending before the Court. Denial of the Writ, on the other hand, will assure effectuation in Little Rock of the same constitutional standards which have been applied in Fort Worth, Charlotte, Augusta, Jackson, Pontiac, San Francisco** and countless other school districts.

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* One of the decisions relied upon by Petitioners to indicate such differences, but which they failed to identify as the source of the quotation at the top of p. 13 of the Petition, is *Mapp* v. *Board of Educ. of Chattanooga*, No. 71-2006 (6th Cir., Oct. 11, 1972). On November 28, 1972, the Court of Appeals for the Sixth Circuit ordered that that matter be reheard *en banc* on December 14, 1972.

** *Flax* v. *Potts, supra; Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra; Acree* v. *County Bd. of Educ.*, 458 F.2d 486 (5th Cir.), *cert. denied*, 41 U.S.L.W. 3274 (November 13, 1972); *Singleton* v. *Jackson Municipal Separate School Dist.*, 432 F.2d 927 (5th Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); *Davis* v. *School Dist. of Pontiac*, 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); *Johnson* v. *San Francisco Unified School Dist.*, 339 F. Supp. 1315 (N.D. Cal. 1971), *appeal pending*.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents respectfully pray that the Writ be denied.

Respectfully submitted,

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